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In the Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY,
Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF OF TEXAS, ALABAMA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, IDAHO, KANSAS, MICHIGAN, MISSISSIPPI, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that a facial challenge to New Hampshire's parental-notification statute should not be not governed by the "no set of circumstances" standard articulated in *United States v. Salerno*, 481 U.S. 739 (1987).

2. Whether the court of appeals erred in holding New Hampshire's parental-notification statute facially invalid under *Stenberg v. Carhart*, 530 U.S. 914 (2000).

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INTEREST OF *AMICI CURIAE*

The State *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Petitioner. Forty-three States, including the State of New Hampshire, have laws requiring some form of parental notification or parental consent prior to the performance of an abortion upon a minor.[1] Each of these States has a strong interest in seeing that its particular notification or consent provision, along with any additional state-enacted abortion-related legislation, will not be struck down as facially unconstitutional unless and until such provision has been shown to have no conceivable constitutional application. This longstanding rule, definitively articulated by the Court in *United States v. Salerno*, 481 U.S. 739, 745 (1987), is appropriate for facial challenges to all state statutes regulating conduct, including those regulating abortion-related conduct. The *amici* States urge the Court to reject the court of appeals's conclusion to the contrary.

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1. *See* ALA. CODE §26-21-3; ALASKA STAT. §18-16-060; ARIZ. REV. STAT. §36-2152; ARK. CODE ANN. §20-16-805; CAL. HEALTH & SAFETY CODE §123450; COLO. REV. STAT. §12-37.5-104; DEL. CODE ANN. tit. 24, §1783; FLA. STAT. ANN. §390.01114; GA. CODE ANN. §15-11-112; IDAHO CODE §18-609A; 750 ILL. COMP. STAT. 70/15; IND. CODE §16-34-2-4; IOWA CODE §135L.3; KAN. STAT. ANN. §65-6705; KY. REV. STAT. ANN. §311.732; LA. REV. STAT. ANN. §40:1299.35.5; ME. REV. STAT. ANN. tit. 22, §1597-A; MD. CODE ANN., HEALTH GEN. §20-103; MASS. GEN. LAWS ch. 112, §12S; MONT. CODE ANN. §50-20-204; MICH. COMP. LAWS §722.903; MINN. STAT. §144.343; MISS. CODE ANN. §41-41-53; MO. REV. STAT. §188.028; NEB. REV. STAT. §71-6902; NEV. REV. STAT. §442.255; N.H. REV. STAT. ANN. §132:25; N.J. STAT. ANN. §9:17A-1.4; N.C. GEN. STAT. §90-21.7; N.D. CENT. CODE §14-02.1-03.1; OHIO REV. CODE ANN. §2919.121; OKLA. STAT. tit. 63, §1-740.2; 18 PA. CONS. STAT. §3206; R.I. GEN. LAWS §23-4.7-6; S.C. CODE ANN. §44-41-31; S.D. CODIFIED LAWS §34-23A-7; TENN. CODE ANN. §37-10-303; TEX. FAM. CODE §33.002; TEX. OCC. CODE §164.052(a)(18) (effective Sept. 1, 2005); UTAH CODE ANN. §76-7-304; VA. CODE ANN. §16.1-241; W. VA. CODE §16-2F-3; WIS. STAT. §48.375; WYO. STAT. ANN. §35-6-118.

The *amici* States also have a strong interest in reconsidering the court of appeals's holding that the judicial-bypass alternative provided by New Hampshire's parental-notification statute does not remedy any perceived constitutional defects in the statute's additional exceptions to its notification requirements. Of the forty-three States that require parental notification or consent, forty-one provide for some form of judicial bypass to ensure that its statute's requirements do not result in harm to pregnant minors.[2] These States have justifiably relied on the Court's holding in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), that a judicial-bypass mechanism will cure any constitutional problems caused by "the possibility that, in some cases, [notification or consent requirements] will not work to the benefit of minors . . . ." *Id.*, at 497 (Kennedy, J., concurring in the judgment in part and dissenting in part). At the very least, judicial-bypass provisions like the one contained in New Hampshire's parental-notification statute should suffice to protect state statutes from a summary invalidation in their entirety, on their face, "based upon a worst-case analysis that may never occur." *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) ("*Akron II*"). The *amici* States believe that the court of appeals's contrary judgment should be reversed.

2. The two state parental-notification statutes without a judicial-bypass alternative give the physician discretion to determine if bypassing the notification requirements is necessary. *See* MD. CODE ANN., HEALTH GEN. §20-103; UTAH CODE ANN. §76-7-304.

SUMMARY OF THE ARGUMENT

Those who seek to prevent a properly-enacted state statute from being applied in any and all circumstances should be required to show that it cannot be validly applied in any and all circumstances. That is the rule of *Salerno*, 481 U.S., at 745, and it is a sound one.

While the rule received its definitive articulation in *Salerno*, it is grounded in constitutional and prudential limitations on the power of federal courts that have been recognized and respected by decisions of the Court as far back as *Marbury v. Madison*. Federal courts are not "roving commissions assigned to pass judgment on the validity of the Nation's laws," *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973); they are instead tasked with "resolving concrete disputes brought before the courts for decision," and must simply decline to apply a statute "when such an application of the statute would conflict with the Constitution." *Younger v. Harris*, 401 U.S. 37, 52 (1971). Only when every application would conflict with the Constitution, therefore, should federal courts find a statute wholly invalid.

In addition to these important institutional limitations on federal court power, vital principles of federalism counsel further caution and restraint when federal courts are asked to review the constitutionality of legislation enacted by a state legislature. In such cases, application of the *Salerno* rule discouraging facial invalidation creates salutary opportunities for state courts "to construe a law to avoid constitutional infirmities." *New York v. Ferber*, 458 U.S. 747, 768 (1982).

There is no good reason not to apply *Salerno*'s rule to facial challenges to legislation regulating abortion-related conduct, and in fact the Court has explicitly applied the rule to such challenges on more than one occasion. *See Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Akron II*, 497 U.S., at 514. It should do so again here.

The court of appeals's failure to apply the *Salerno* rule to this facial challenge to New Hampshire's Parental Notification Prior to Abortion Act resulted in an unjustified invalidation of the Act, in its entirety, "based upon a worst-case analysis that may never occur." *Akron II*, 497 U.S., at 514. Rather than asking whether the New Hampshire statute's notification requirements could ever be constitutionally applied—undoubtedly they could—the court of appeals focused on a few hypothetical situations in which, in its judgment, the requirements—and in particular an *exception* to those requirements—might place a minor's life or health at risk. The court of appeals erred in doing so.

Even had its method of hypothetical analysis been sound, however, the court of appeals reached the wrong conclusions with respect to New Hampshire's statute. That statute, with or without an explicit health exception, is not facially an *obstacle* to any woman's choice; instead, it is designed to provide *aid* for the decision-making process of pregnant minors—and their physicians—facing a difficult choice. In fact, in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), the Court upheld against constitutional challenge a parental-notification statute containing the same language that the court of appeals believed defective here. And *Stenberg v. Carhart*, 530 U.S. 914 (2000), does not require a different result. The Court's determination in that case that a statute prohibiting a particular abortion choice must provide certain exceptions should not be construed to control the statute at issue here, which operates to enhance and protect the decision-making process of young women who may not have the maturity or capacity to make an informed choice on their own.

Finally, the New Hampshire statute's judicial-bypass alternative should have alleviated any of the court of appeals's concerns that, in the rarest of cases, the statute's typical 48-hour delay could place a minor's life or health at risk. The statute provides for a bypass mechanism that is available 24-hours-a-day,

7-days-a-week, and requires judges to make their decisions "without delay" in order to protect "the best interest of the pregnant minor." N.H. REV. STAT. ANN. §132:26(II)(b)-(c). The State of New Hampshire is entitled to a presumption that its judges will follow their mandate under the statute, and do what is necessary to ensure that no minor comes to harm through any application of the State's Parental Notification Prior to Abortion Act. That should be more than enough to uphold the statute against facial challenge.

ARGUMENT

I. FACIAL CHALLENGES TO STATE STATUTES REGULATING ABORTION-RELATED CONDUCT SHOULD BE SUBJECT TO *SALERNO*'S "NO SET OF CIRCUMSTANCES" RULE.

A. The *Salerno* Rule Has Long Been a Fixture of the Court's Jurisprudence.

In the 1987 case of *United States v. Salerno*, the Court described the high burden carried by a plaintiff seeking to overturn a validly-enacted statute as unconstitutional on its face: "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S., at 745.

Due to its clear articulation in that case, the rule has since come to be identified with *Salerno*, and is frequently referred to as the "no set of circumstances" test. But the rule did not first appear in the Court's jurisprudence in 1987; even at that time its application was longstanding. *See, e.g., Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) (noting that a statute "may be considered invalid 'on its face' . . . [if] it is unconstitutional in every conceivable application"); *Sec'y of State of Maryland v. Munson Co.*, 467 U.S. 947, 965 n.13 (1984) (stating that a facially invalid statute "in all its applications

falls short of constitutional demands"); *New York v. Ferber*, 458 U.S. 747, 767-68 (1982) (noting that facial-invalidity analysis is problematic in part because it is "undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation") (citation omitted); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (stating that those challenging a statute on its face must show that it is "invalid in toto—and therefore incapable of any valid application") (citation omitted); *Steffel v. Thompson*, 415 U.S. 452, 474 (1974) (same); *Broadrick*, 413 U.S., at 610 (noting that the challengers sought for the statute to "be struck down on its face and held to be incapable of any constitutional application"); *Younger*, 401 U.S., at 53-54 (suggesting that facial invalidation is inappropriate unless the challenged statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it") (citation omitted); *Watson v. Buck*, 313 U.S. 387, 402 (1941) (same).

And since *Salerno*'s articulation of the "no set of circumstances" test, the Court has cited and applied the rule many times. *See, e.g., Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (citing the *Salerno* rule); *Reno v. Flores*, 507 U.S. 292, 301 (1993) (noting that the *Salerno* rule applied to both the constitutional and statutory facial challenges before the Court); *Rust*, 500 U.S., at 183 (applying the *Salerno* rule to the facial challenge of an abortion-related regulation); *Akron II*, 497 U.S., at 514 (same); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988) (noting that facial challenges are based on the claim that a statute is unconstitutional in all of its applications); *see also Webster v. Reprod. Health Servs.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in judgment)

(applying *Salerno* to the facial challenge of an abortion-related regulation).

One Justice has offered a simple and compelling justification for this great weight of authority supporting the "no set of circumstances" test for facial challenges to validly-enacted legislation: "before declaring a statute to be void in all its applications . . . , we have at least imposed upon the litigant the eminently reasonable requirement that he establish that the statute was *unconstitutional* in all its applications." *City of Chicago v. Morales*, 527 U.S. 41, 77-78 (1999) (Scalia, J., dissenting). Respondents here have asked the federal courts to find New Hampshire's parental-notification statute unconstitutional in every conceivable application; it is thus eminently reasonable for the federal courts to require Respondents to show that New Hampshire's validly-enacted statute is in fact unconstitutional in every conceivable application.

B. The "Large Fraction" Test Has Not Commanded a Majority of the Court.

Notwithstanding the weight of authority supporting application of the "no set of circumstances" test to facial challenges to validly-enacted State statutes, the court of appeals held that it could strike down New Hampshire's parental-notification statute as unconstitutional on its face—and therefore as unconstitutional in every conceivable application—if the court determined that the statute was unconstitutional in only a "large fraction" of the most relevant anticipated applications. *Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 57-58 (CA1 2004).

The court of appeals grounded its holding on language from the three-Justice joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*: "[t]he unfortunate yet persisting conditions we document above will mean that in a large fraction of the cases in which [the statutory provision at issue] is

relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid."[3] 505 U.S. 833, 895 (1992); *see Heed*, 390 F.3d, at 57.

The court of appeals understood this language to stand for the proposition that Pennsylvania's spousal-notification requirement could be invalidated on its face—in every conceivable application—if it constituted an "undue burden" on a woman's decision to undergo an abortion in only a "large fraction" of the cases in which the requirement would be relevant. *See Heed*, 390 F.3d, at 57; *Casey*, 505 U.S., at 895. Read thusly, the court of appeals deemed *Casey*'s undue-burden standard in tension with the *Salerno* principle that a statute should be invalidated on its face only when it constitutes an unconstitutional burden in *every* case in which its requirements are relevant. *See Salerno*, 481 U.S., at 745.

It is significant, however, that the definition of an "undue burden" provided by the same three-Justice joint opinion—and later adopted by the Court in *Stenberg*, 530 U.S., at 921—makes no necessary connection between that substantive constitutional standard (undue burden) and the particular showing that must be made by plaintiffs seeking to facially invalidate state statutes under that standard. *See Casey*, 505 U.S., at 877 ("A finding of an undue

3. The court of appeals's reliance on this sentence from *Casey* in striking down New Hampshire's parental-notification statute is not without irony, considering that the very next sentence of the *Casey* joint opinion observes,

> [t]his conclusion is *in no way inconsistent with our decisions upholding parental notification or consent requirements*. Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. 505 U.S., at 895 (joint opinion) (citation omitted) (emphasis added).

burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."); *Stenberg*, 530 U.S., at 921. Indeed, in her concurring opinion in *Webster*, Justice O'Connor cited and applied *Salerno*'s "no set of circumstances" rule for facial challenges to state legislation, 492 U.S., at 524 ("some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional"), and simultaneously reaffirmed her commitment to measuring abortion-related regulations by the substantive undue-burden standard, *id.*, at 530—clearly suggesting the two can be read consistently.

Salerno's "no set of circumstances" rule is thus not, as the court of appeals indicated, *Heed*, 390 F.3d, at 57, in "tension with" the undue-burden standard of *Casey* and *Stenberg*. The question is simply whether plaintiffs seeking to facially invalidate a state statute on undue-burden grounds need to show that the statute constitutes an undue burden on a woman's abortion decision in *all* of its possible applications, or merely in some large fraction of them. *See, e.g. Manning v. Hunt*, 119 F.3d 254, 269 (CA4 1997) ("[I]n order to succeed, Appellants are required to show that under no set of circumstances can the Act be applied in a manner which is not an undue burden . . . ."). Although the *Salerno* rule has been affirmed by the Court on numerous occasions, the "large fraction" language found in *Casey*'s three-Justice joint opinion has never commanded a majority of the Court. It should not do so here.

C. The Court Has Applied the *Salerno* Rule in Facial Challenges to Abortion-Related Regulations.

The court of appeals thought it significant that in *Stenberg* a majority of the Court affirmed the continuing vitality of the substantive undue-burden standard for abortion-related regulations

set out by the joint opinion in *Casey*. *Heed*, 390 F.3d, at 57; *see also Stenberg*, 530 U.S., at 921. The "large fraction" language of the *Casey* joint opinion, however, is nowhere to be found in the majority opinion in *Stenberg*. *See Stenberg*, 530 U.S., at 920-46. The Court in *Stenberg* did not hold that a statute regulating abortion-related conduct may be found unconstitutional in all of its possible applications upon a showing that it is unconstitutional in a "large fraction" of its potential applications; indeed, the Court in that case did not address at all the standard of review governing facial challenges to abortion-related legislation.

But the Court has previously addressed this very issue. On at least two occasions, the Court has explicitly applied *Salerno*'s "no set of circumstances" rule in facial challenges to abortion-related regulations. In *Rust*, 500 U.S., at 177-78, the Court took up a facial challenge to federal regulations "which limit the ability of Title X fund recipients to engage in abortion-related activities." The Court began its analysis by pointing out that

> Petitioners are challenging the *facial* validity of the regulations. Thus, we are concerned only with the question whether, on their face, the regulations . . . can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights. Petitioners face a heavy burden in seeking to have the regulations invalidated as facially unconstitutional. *Id.*, at 183.

An extensive quote from *Salerno* followed. *Id.*

Even more pertinent to the case at hand is the Court's opinion in *Akron II*, 497 U.S., at 506, which concerned a facial challenge to an Ohio statute much like the New Hampshire law at issue here "that, with certain exceptions, prohibits any person from performing an abortion on an unmarried, unemancipated, minor woman absent notice to one of the woman's parents or a court order of approval."

Citing Justice O'Connor's concurrence in *Webster*, 492 U.S., at 524, the Court confirmed that, "because appellees are making a facial challenge to a statute, *they must show that 'no set of circumstances exist under which the Act would be valid.'*" *Akron II*, 497 U.S., at 514 (emphasis added). The Court then explicitly criticized the court of appeals for invalidating Ohio's parental-notification statute "on a facial challenge based upon a worst-case analysis that may never occur." *Id.*

The Court's admonishment in *Akron II* may be applied with equal force to the court of appeals's judgment here. For the court of appeals's decision to strike down New Hampshire's entire statutory notification scheme might fairly be said to rest on the hypothetical possibility that, at some point in time: 1) a minor who desires to have an abortion; 2) will be determined by a doctor to require that abortion in less than 48 hours; 3) that abortion will be necessitated by a medical emergency that does not threaten her life; 4) there will be no way to receive timely confirmation that a parent has been notified; *and* 5) a judge will refuse to determine with sufficient alacrity that such an abortion is in the minor's best interests, notwithstanding his statutory obligation to rule "without delay." *See* N.H. REV. STAT. ANN. §§132:24 to :28; *Heed*, 390 F.3d, at 61-64.

Whether, in that worst-case scenario, New Hampshire's notification requirements might constitute an undue burden on a hypothetical minor's decision to have abortion may be a close academic question. But with respect to the parties before this Court, it can be no more, for "[t]he delicate power of pronouncing [legislation] unconstitutional is not be exercised with reference to hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22 (1960).

D. State Laws Regulating Abortion-Related Conduct Are Entitled to the Same Deference Accorded to State Laws Regulating Other Potentially Protected Conduct.

There are good reasons to reaffirm the Court's application of *Salerno* in the context of facial challenges to statutes regulating abortion-related conduct. *See Rust*, 500 U.S., at 183; *Akron II*, 497 U.S., at 514. The Court's established reluctance to determine a statute's facial validity by reference to "a worst-case analysis that may never occur," *Akron II*, 497 U.S., at 514, is grounded largely in the truism that our Constitution limits the jurisdiction of federal courts to actual cases and controversies, *see Ferber*, 458 U.S., at 767 n.20; U.S. CONST. art. III, §2.

As the Court explained in its landmark decision in *Younger v. Harris*:

> Procedures for testing the constitutionality of a statute 'on its face' in the manner apparently contemplated by [*Dombrowski v. Pfister*, 380 U.S. 479 (1965)], and for then enjoining all action to enforce the statute until the State can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass

> judgment on laws before the courts are called upon to enforce them. Ever since the Constitutional Convention rejected a proposal for having members of the Supreme Court render advice concerning pending legislation it has been clear that, even when suits of this kind involve a 'case or controversy' sufficient to satisfy the requirements of Article III of the Constitution, the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary. 401 U.S., at 52.

In other words, "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S., at 610-11.

These institutional limitations on federal courts are as relevant to this constitutional challenge to New Hampshire's parental-notification requirements as they were to the challenges to California's Criminal Syndicalism Act in *Younger*, 401 U.S., at 38, or to Oklahoma's restriction on political activity by state employees in *Broadrick*, 413 U.S., at 602.

And these constitutional and prudential limitations on the power of federal courts to declare laws facially invalid are buttressed by important principles of federalism when the statute challenged in federal court has been validly enacted by a state legislature. In these situations, "focusing on the factual situation before" the Court, and rejecting a hypothetical worst-case-scenario analysis, "fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities." *Ferber*, 458 U.S., at 768; *see also Munson*, 467 U.S., at 976-78 (Rehnquist, J., dissenting) (explaining that analysis based upon the statutory application actually before the court "is less intrusive on the legislative prerogative and less disruptive of state

policy" and "allows state courts the opportunity to construe a law to avoid constitutional infirmities"); *Stenberg*, 530 U.S., at 979 (Kennedy, J., dissenting) (noting that the federal district court's pre-enforcement injunction of the challenged State law "denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute"). In short, "when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

The *amici* States urge the Court to acknowledge and affirm the Fourth Circuit's "observation that the logic of the *Salerno* test is necessary to show deference to legislatures, particularly in light of the limitation imposed by Article III of the Constitution that the judiciary act only in cases and controversies." *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 165 (CA4 2000); *see also* U.S. CONST. art. III, §2. And the judicious deference undergirding the *Salerno* test—inherent in the simple rule that a state statute will not be held unconstitutional in every conceivable application unless and until it has been shown to be unconstitutional in every conceivable application—is no less appropriate for challenges to state laws regulating abortion-related conduct than for challenges to state laws regulating other forms of potentially protected conduct. *See, e.g.*, *Younger*, 401 U.S., at 38 (challenge to California's Criminal Syndicalism Act); *Broadrick*, 413 U.S., at 602 (challenge to Oklahoma's restriction on political activity by state employees).

As the *Casey* joint opinion observed, at stake in challenges to abortion-related statutes "is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." 505 U.S., at 877. The States have an unquestioned authority to regulate certain abortion-related conduct, *see id.*, and the Court should ensure that their attempts to do so are reviewed by the

federal courts with an appropriate caution and restraint, *see Erznoznik*, 422 U.S., at 216.

E. The Court Has Properly Limited "Overbreadth" Analysis to Speech-Related Claims Under the First Amendment.

Closely related to *Salerno*'s rule that a statute will be facially invalidated only when it has been shown to be unconstitutional in all of its applications, not merely some of them, *see* 481 U.S., at 745, is the traditional rule that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court," *Ferber*, 458 U.S., at 767; *see also Raines*, 362 U.S., at 21.

The Court has recognized a limited exception to this latter rule; an exception that has "come to be known as the First Amendment overbreadth doctrine." *Ferber*, 458 U.S., at 768. This exception, by which a person whose expressive conduct is unprotected may nevertheless challenge the statute at issue as overly broad, *see id.*, is "predicated on the sensitive nature of protected expression," *id.*, and can be justified only by "weighty countervailing policies," *id.* (citation omitted). The First Amendment overbreadth doctrine is "strong medicine" that the Court has employed "only as a last resort." *Broadrick*, 413 U.S., at 613. And, as its name suggests, the Court has limited the doctrine to challenges brought under the First Amendment. *See, e.g., Salerno*, 481 U.S., at 745 ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."); *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984) ("[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad.").

Some academic commentators have argued that the Court should expand the overbreadth doctrine to make its exception available to those challenging state statutes regulating abortion-

related conduct. *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 269-71 (1994). The *amici* States urge the Court not to do so. The First Amendment overbreadth doctrine is in some tension with the constitutional and prudential limitations on the federal judiciary's power discussed in the section above, and its exception to the traditional rule should be justified only in the context of protecting the freedom of expression, of which "one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937).

Indeed, in *Roe v. Wade* itself, the Court took care to distinguish the liberty interests at issue, suggesting that overbreadth analysis is not appropriate in the abortion-regulation context: "[w]e are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under . . . *Younger v. Harris*, 401 U.S., at 50." *Roe*, 410 U.S. 113, 166 (1973). And, since *Roe*, the Court has rejected even that opinion's strict scrutiny as undervaluing the States' legitimate interests in regulating abortion-related conduct. *See Casey*, 505 U.S., at 875-77 (joint opinion). In recognition of those legitimate interests, and of the important differences between the right to speak and the right to choose an abortion, the Court should make clear that the First Amendment overbreadth doctrine does not apply to challenges to state statutes regulating abortion-related conduct.

II. NEW HAMPSHIRE'S PARENTAL-NOTIFICATION STATUTE IS NOT FACIALLY INVALID.

The joint opinion in *Casey* acknowledged that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." 505 U.S., at 877. New Hampshire's parental-notification

requirements do not present a substantial obstacle to any woman's exercise of the right to choose an abortion—and they certainly have not been shown to threaten any rights of the actual Respondents before the Court here, *see, e.g., Ferber*, 458 U.S., at 768; those notification requirements are thus entirely permissible.

The requirement that a parent or guardian receive notification before an unemancipated minor undergoes an abortion, *see* N.H. REV. STAT. ANN. §132:25, is not constitutionally controversial. The Court has considered and upheld similar parental-notification statutes on several occasions. *See Lambert v. Wicklund*, 520 U.S. 292 (1997); *Hodgson v. Minnesota*, 497 U.S. 417, 497 (1990); *Akron II*, 497 U.S., at 514; *H.L. v. Matheson*, 450 U.S. 398 (1981). Neither does the New Hampshire statute's typical 48-hour delay give rise to constitutional concerns. *See* N.H. REV. STAT. ANN. §132:25; *Hodgson*, 497 U.S., at 448 (opinion of Stevens, J.) ("The 48-hour delay imposes only a minimal burden on the right of the minor to decide whether or not to terminate her pregnancy."); *Akron II*, 497 U.S., at 514 ("[T]he mere possibility that the procedure may require up to 22 days in a rare case is plainly insufficient to invalidate the statute on its face.").

Nevertheless, the court of appeals held New Hampshire's Parental Notification Prior to Abortion Act invalid—in its entirety, on its face—because of a perceived constitutional defect in an explicit *exception* to its requirements: "[n]o notice shall be required . . . [if t]he attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice . . . ." N.H. REV. STAT. ANN. §132:26(I)(a); *see Heed*, 390 F.3d, at 59-64. The court of appeals concluded that this "death exception" was constitutionally inadequate under *Stenberg*, 530 U.S., at 930-38. *See Heed*, 390 F.3d, at 60.

That conclusion was incorrect, for at least four reasons: 1) New Hampshire's statute poses no substantial obstacle to pregnant minors' abortion choices; 2) the Court upheld a parental-notification statute containing the same exception in *Hodgson*, 497 U.S., at 497; 3) the exception is not constitutionally infirm under *Stenberg*, 530 U.S., at 930; and 4) even if the exception were in doubt under *Stenberg*, any such infirmity would be remedied by the statute's judicial-bypass provisions.

A. New Hampshire's Notification Statute Is Not an Obstacle to Choice: It Provides Aid to Minors Facing a Difficult Choice.

Through its Parental Notification Prior to Abortion Act, New Hampshire, like forty-two of its sister States, has created a structural mechanism by which the parent or guardian of a minor facing an abortion decision may give that "lonely or even terrified minor advice that is both compassionate and mature." *Akron II*, 497 U.S., at 520 (opinion of Kennedy, J.); *see* N.H. REV. STAT. ANN. §§132:24 to :28. New Hampshire's mechanism is less restrictive than that of many States; of the forty-three States that have passed analogous legislation, twenty-four have chosen to require parental *consent* before a minor many obtain an abortion.[4] New Hampshire's statute, in contrast, places it among the nineteen

4. *See* ALA. CODE §26-21-3; ALASKA STAT. §18-16-060; ARIZ. REV. STAT. §36-2152; CAL. HEALTH & SAFETY CODE §123450; IDAHO CODE §18-609A; IND. CODE §16-34-2-4; KY. REV. STAT. ANN. §311.732; LA. REV. STAT. ANN. §40:1299.35.5; ME. REV. STAT. ANN. tit. 22, §1597-A; MASS. GEN. LAWS ch. 112, §12S; MICH. COMP. LAWS §722.903; MISS. CODE ANN. §41-41-53; MO. REV. STAT. §188.028; N.C. GEN. STAT. §90-21.7; N.D. CENT. CODE §14-02.1-03.1; OHIO REV. CODE ANN. §2919.121; 18 PA. CONS. STAT. §3206; R.I. GEN. LAWS §23-4.7-6; S.C. CODE ANN. §44-41-31; TENN. CODE ANN. §37-10-303; TEX. OCC. CODE §164.052(a)(18) (effective Sept. 1, 2005); VA. CODE ANN. §16.1-241; WIS. STAT. §48.375; WYO. STAT. ANN. §35-6-118.

States requiring only parental notification.[5] *See Akron II*, 497 U.S., at 511 (observing that notice requirements are less intrusive than consent requirements and give no one a veto power over a minor's abortion decision).

And, in addition to advancing the State's legitimate interests in expressing profound respect for the life of the unborn, *see Casey*, 505 U.S., at 877 (joint opinion), New Hampshire's notification requirements also directly embody the State's acknowledgment of and response to "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) ("*Bellotti II*"). New Hampshire has placed no obstacles in the path of a woman's informed choice; it has simply taken steps to ensure that a minor who may not have the maturity or capacity for an informed choice has a reasonable opportunity to receive guidance and understanding in making her choice from a parent who has her best interests at heart. *See Casey*, 505 U.S., at 895 (joint opinion); *Akron II*, 497 U.S., at 520 (opinion of Kennedy, J.).

B. The Court Upheld a Substantially Similar Notification Statute in *Hodgson*.

The court of appeals's *facial* analysis of the New Hampshire parental-notification statute's "death exception" should have ended with the observation that, in 1990, the Court upheld a Minnesota

5. *See* ARK. CODE ANN. §20-16-805; COLO. REV. STAT. §12-37.5-104; DEL. CODE ANN. tit. 24, §1783; FLA. STAT. ANN. §390.01114; GA. CODE ANN. §15-11-112; 750 ILL. COMP. STAT. 70/15; IOWA CODE §135L.3; KAN. STAT. ANN. §65-6705; MD. CODE ANN., HEALTH GEN. §20-103; MINN. STAT. §144.343; MONT. CODE ANN. §50-20-204; NEB. REV. STAT. §71-6902; NEV. REV. STAT. §442.255; N.H. REV. STAT. ANN. §132:25; N.J. STAT. ANN. §9:17A-1.4; OKLA. STAT. tit. 63, §1-740.2; S.D. CODIFIED LAWS §34-23A-7; UTAH CODE ANN. §76-7-304; W. VA. CODE §16-2F-3.

parental-notification statute with an altogether indistinguishable exception. *See Hodgson*, 497 U.S., at 422, 426 & n.7; *id.*, at 493 (Kennedy, J., concurring in the judgment in part and dissenting in part). In terms virtually identical to those used in the New Hampshire law, Minnesota's statute provided—and, after the Court's review, still provides—that "[n]o notice shall be required under this section if: (a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; . . . ." MINN. STAT. §144.343(4); *Hodgson*, 497 U.S., at 426 n.7.[6] The court of appeals dismissed the Court's judgment in *Hodgson*, however, reasoning that the "Court did not consider a challenge to [the Minnesota] statute's lack of a health exception." *Heed*, 390 F.3d, at 60.

It is true that there is little discussion of any need for a health exception in *Hodgson*; in that case the Court held that a provision

6. Arkansas's parental-notification statute contains a virtually identical exception to that found in the Minnesota and New Hampshire notification statutes. *Compare* ARK. CODE ANN. §20-16-805(1) *with* MINN. STAT. §144.343(4) *and* N.H. REV. STAT. ANN. §132:26(I)(a). North Dakota's parental-*consent* statute similarly provides for an exception where "necessary to preserve [the minor's] life," but does not otherwise mention the minor's health. N.D. CENT. CODE §14-02.1-03.1(12). Wyoming's parental-consent statute takes a similar approach. WYO. STAT. ANN. §35-6-118(c) (providing exception where "necessary to preserve the minor from an imminent peril that substantially endangers her life"). The parental-consent statutes of Maine and Missouri likewise do not explicitly provide for health-related exceptions. *See* ME. REV. STAT. ANN. tit. 22, §1597-A; MO. REV. STAT. §188.028. All of these statutes do, however, provide a judicial bypass alternative to their respective notification or consent requirements. *See* ARK. CODE ANN. §20-16-804; ME. REV. STAT. ANN. tit. 22, §1597-A; MINN. STAT. §144.343(6); MO. REV. STAT. §188.028; N.D. CENT. CODE §14-02.1-03.1(2); WYO. STAT. ANN. §35-6-118.

requiring two-parent notification would have been unconstitutional standing alone, but that any constitutional infirmity was remedied by the statute's provision for a judicial bypass when notification would not be in the minor's best interests. *Hodgson*, 497 U.S., at 423; *id.*, at 493 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Nevertheless, the court of appeals's easy dismissal of *Hodgson* gives the decision insufficient respect. Those challenging Minnesota's statute expressly complained about the "death exception" in their brief to the Court. Brief for Cross-Respondents, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (No. 88-1125, 88-1309), 1989 WL 1127353, at *15 n.29 ("This exception does not help minors whose health problems warrant immediate abortions but whose lives cannot be certified to be so imminently endangered."). And although the Court may not have been principally focused on that particular provision of the Minnesota statute, the exception was explicitly referenced or quoted no fewer than four times in *Hodgson*—three times in Justice Stevens' opinion for the Court, and once in Justice Kennedy's concurrence. *See Hodgson*, 497 U.S., at 422, 426 & n.7; *id.*, at 493 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Moreover, the court of appeals did not hold that the New Hampshire statute's "death exception" is unconstitutional as applied to a particular factual situation; it held the provision unconstitutional *on its face*. The court of appeals was thus forced to assume that the Court in *Hodgson* upheld Minnesota's parental-notification statute against all constitutional challenges while, in the process of so doing, explicitly and repeatedly referencing a provision that rendered the statute *patently* unconstitutional. That

assumption was not justified. The Court's decision in *Hodgson* compels reversal of the court of appeals's judgment here.[7]

C. *Stenberg* Does Not Require a Different Result.

Rather than looking to *Hodgson* or other of the Court's parental-notification cases for relevant precedent, the court of appeals looked to *Stenberg*, in which the Court held that Nebraska's ban on partial-birth abortions required an exception "for the preservation of the life or health of the mother." *Stenberg*, 530 U.S., at 931 (citation omitted); *see Heed*, 390 F.3d, at 60, 62.

Contrary to the court of appeals's conclusion, however, the Court in *Stenberg* did not create a new, *per se* requirement that every regulation touching abortion-related conduct contain both life and health exceptions. Instead, the Court there held that such exceptions are required "where substantial medical authority supports the proposition that *banning a particular abortion procedure* could endanger women's health . . . ." *Stenberg*, 530 U.S., at 938 (emphasis added).[8]

New Hampshire has not banned any particular abortion procedure; it has simply required notification of an unemancipated

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7. New Hampshire's parental-notification statute was passed in 2003. *See* N.H. REV. STAT. ANN. §132:24 to :28. Given the similarities between the Minnesota and New Hampshire statutes, it is likely the case that, in an effort to draft a constitutional notification law, the New Hampshire legislators borrowed heavily from one that had been considered and upheld by the Court. New Hampshire's efforts to follow this Court's guidance in crafting constitutional legislation should not be rewarded with a summary, pre-enforcement invalidation of its statute.

8. The court of appeals's *per se* health exception requirement could also threaten, among other regulations, state statutes permitting health-care professionals to refuse on religious or moral grounds to participate in abortion procedures. *See* N.M. STAT. ANN. §30-5-2; S.C. CODE ANN. §44-41-50; WYO. STAT. ANN. §35-6-105.

minor's parent before that minor undergoes the abortion procedure of her choice. *See* N.H. REV. STAT. ANN. §132:24 to :28. And the interests served by New Hampshire's notification requirements—including, in particular, the interest the Court has recognized in "providing an opportunity for parents to supply essential medical and other information to a physician," *Matheson*, 450 U.S., at 411—are, if anything, even more compelling if the minor's health is at risk. *See, e.g., Bellotti II*, 443 U.S., at 651 n.31 ("The propriety of parental involvement in a minor's abortion decision does not diminish as . . . legitimate concerns for the pregnant minor's health increase.").

Although state legislatures may choose to forgo requiring parental notification when a doctor determines that a minor needs an abortion for health reasons, nothing in *Roe*, *Casey*, *Stenberg*, or the Constitution itself prohibits States from requiring parental notification in that circumstance. The Constitution is not offended by a state requirement that doctors notify a minor's parent upon determining that the minor's health is at risk. *See, e.g., Akron II*, 497 U.S., at 518-19 ("We continue to believe that a State may require the physician himself or herself to take reasonable steps to notify a minor's parent because the parent often will provide important medical data to the physician.").

D. The Statute's Judicial-Bypass Provision Ensures That No Minor's Life or Health Will Be Endangered by the Notification Requirements.

Even if the New Hampshire statute's "death exception" were infirm under *Stenberg*, the statute as a whole would nevertheless be constitutional due to its provision for judicial bypass. *See* N.H. REV. STAT. ANN. §132:26(II). The Court "has explicitly approved judicial bypass as a means of tailoring a parental *consent* provision so as to avoid unduly burdening the minor's limited right to obtain an abortion." *Hodgson*, 497 U.S., at 461 (O'Connor, J., concurring

in part and concurring in the judgment in part) (emphasis added); *see also Bellotti II*, 443 U.S., at 642-44; *id.*, at 651 n.31 ("[T]he opportunity for direct access to court . . . is adequate to safeguard throughout pregnancy the constitutionally protected interests of a minor in the abortion decision."). Judicial-bypass provisions are no less salutary in the parental-notification context. *See Akron II*, 497 U.S., at 511; *Hodgson*, 497 U.S., at 497.

In *Hodgson*, the Court deemed Minnesota's requirement that both parents receive notification prior to a minor's abortion to be unconstitutional on the ground that it was not reasonably related to any legitimate state interest. 497 U.S., at 449. The Court nevertheless held the requirement constitutional when combined with a judicial-bypass alternative. *Id.*, at 461 (O'Connor, J., concurring in part and concurring in the judgment in part); *id.*, at 497 (Kennedy, J., concurring in the judgment in part and dissenting in part). The same should be true here. To the extent that, "in some cases, the [exception] would not work to the benefit of minors," the New Hampshire statute's judicial-bypass mechanism will "identify, and exempt from the strictures of the law, those cases . . . ." *Id.*, at 497 (Kennedy, J., concurring in the judgment in part and dissenting in part).

1. The judicial-bypass provision remedies the court of appeals's hypothetical health-related concerns.

The court of appeals recognized that a judicial-bypass provision could "stand in for" other constitutional requirements, including—on the assumption that one was necessary—a health-related exception to parental notification. *See Heed*, 390 F.3d, at 62. It also acknowledged that the New Hampshire statute's bypass mechanism "provides minors 24-hour, 7-day access to the courts," and requires courts to "reach a decision promptly and without delay so as to serve the best interest of the pregnant minor." *See Heed*, 390 F.3d, at 55, 62; N.H. REV. STAT. ANN. §132:26(II)(b)-(c).

Nevertheless, it held that the possibility of delay in reaching a judicial decision could put some hypothetical minors' health at risk, thus rendering the bypass provision constitutionally inadequate. *See Heed*, 390 F.3d, at 62.

The court of appeals should have instead recognized that "a State may expect that its judges will follow mandated procedural requirements." *Akron II*, 497 U.S., at 515. The New Hampshire Legislature has mandated that its state judges, when asked to determine whether parental notification is necessary, reach their decisions "without delay" to ensure "the best interest of pregnant minor." N.H. REV. STAT. ANN. §132:26(II)(b). New Hampshire is thus entitled to the presumption that its judges will comply with the statute and act with the speed necessary to serve the best interests of pregnant minors seeking to avoid notifying their parents of their decision to have an abortion—particularly when that decision might impact the minor's health.

The court of appeals's speculation that the judicial-bypass mechanism might not be implemented so as to ensure the best interests of the pregnant minor—despite the statute's explicit requirement to the contrary—contravenes the longstanding principle that, "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Akron II*, 497 U.S., at 514 (citation omitted). And, for that reason, state statutes should not be invalidated, in their entirety, "on a facial challenge based upon a worst-case analysis that may never occur." *Akron II*, 497 U.S., at 514.

2. The judicial-bypass provision remedies the court of appeals's hypothetical concerns related to the "death exception."

In addition to finding the New Hampshire statute's "death exception" inadequate for its failure to include an explicit exception for health, the court of appeals found that the exception for death

itself was "drawn too narrowly." *Heed*, 390 F.3d, at 64. The court of appeals concluded that the language "*necessary* to prevent the minor's death," N.H. REV. STAT. ANN. §132:26(I)(a) (emphasis added), "fails to safeguard a physician's good-faith medical judgment that a minor's life is at risk," *Heed*, 390 F.3d, at 64, and that the statute's background 48-hour delay "forces physicians either to gamble with their patients' lives in hopes of complying with the notice requirement before a minor's death becomes inevitable, or to risk criminal and civil liability by providing an abortion without parental notice." *Id.*, at 63.

As an initial matter, it is not at all clear that the statute fails to protect the good-faith judgment of physicians. The statute's penalty provision states that "[p]erformance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification." N.H. REV. STAT. ANN. §132:27. It further exempts from liability anyone who "has attempted with reasonable diligence to deliver notice, but has been unable to do so." *Id.* The "death exception," in turn, permits an abortion without notice whenever there is an appropriate certification of necessity in the minor's medical record. *Id.*, §132:26(I)(a). New Hampshire's Attorney General argued to the court of appeals that New Hampshire's state courts would read the statute to protect physicians' good-faith medical judgments. *See Heed*, 390 F.3d, at 63. That argument is supported by the approach this Court took to the Georgia statute at issue in *Doe v. Bolton*, 410 U.S. 179, 192 (1973) ("Whether, in the words of the Georgia statute, 'an abortion is necessary' is a professional judgment that the Georgia physician will be called upon to make routinely."). Rather than rejecting the possibility of a salutary construction outright, the court of appeals should have allowed a New Hampshire court "the opportunity to construe [the] law to avoid constitutional infirmities," *Ferber*, 458 U.S., at 768.

And further, the court of appeals's concern that certain, hypothetical physicians will be forced "to gamble with their patients' lives" under the "death exception" is unfounded. The physicians placed in an untenable position under the statute, according to the court of appeals, are those who both: 1) suspect that an abortion will be necessary to save the life of the pregnant minor; and 2) are not confident that the procedure absolutely must need to take place within 48 hours. *See Heed*, 390 F.3d, at 63. The statute, however, provides two clear additional options to such physicians—options ignored by the court of appeals. First, such physicians can seek assurance that those entitled to notice have actually been notified. *See* N.H. REV. STAT. ANN. §132:26(I)(b). A parent's written note makes the 48-hour waiting period unnecessary. *Id.* Second, such physicians can make use of the judicial-bypass alternative available 24-hours-a-day, 7-days-a-week. N.H. REV. STAT. ANN. §132:26(II)(c).

Whether or not the New Hampshire statute's "death exception" to its otherwise unquestionably permissible parental-notification requirements could have been drawn more broadly, the statute's provision of a judicial-bypass alternative makes it more than "fairly possible [to] construe [the] statute to avoid a danger of unconstitutionality." *Akron II*, 497 U.S., at 514 (citation omitted). And whether the exception could be unconstitutional as applied to some doctor, or some minor, somewhere, New Hampshire's entire statutory scheme should not be invalidated "on a facial challenge based upon a worst-case analysis that may never occur." *Akron II*, 497 U.S., at 514.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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